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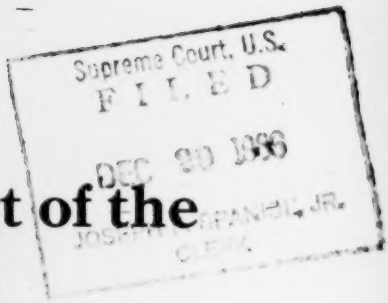

No. _____

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

(Appellate Department of the Superior Court,
State of California, County of Los Angeles
No. CR A 23539)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* Opinion.

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In the Supreme Court of the United States

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HERBERT PAGEL,

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner, who is Caucasian, was accused of "hit and run" driving where the victim and all prosecution witnesses were black. During jury selection, the defense used three of its first four peremptory challenges on black jurors. The trial court rejected defense counsel's reasons for excusing the three black jurors, dismissed the jury venire and ordered that a new jury panel be called. Jury selection began anew, subject to the restrictions imposed during the first selection process. Petitioner was ultimately convicted.

This petition thus squarely presents the issue reserved by footnote 12 of *Batson v. Kentucky, supra*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712, i.e., whether the restrictions on a prosecutor's use of peremptory challenges — required by the Equal Protection Clause — should also apply to defense counsel.

Without question, the issue is a difficult one with salient points that could be presented by each side. However, several considerations demonstrate a defendant should not be restricted in the same fashion as the prosecution, including (1) the fact that *Batson* is substantially based on the Equal Protection Clause's restrictions on *state* action, (2) the difference in a criminal case between the respective duties of the prosecutor as a representative of the state and defense counsel as the representative of an individual defendant, (3) the uniquely personal involvement of the defendant in a criminal prosecution that could lead to his imprisonment, and (4) the notion that a criminal defendant's right to jury trial should not be impinged at all, lest the system be perceived as compromising this most hallowed of all constitutional rights.

QUESTION PRESENTED

Therefore, petitioner asks this Honorable Court to grant certiorari to review the following important issue:

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky, supra*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* Opinion.

PARTIES TO THE PROCEEDING

Petitioner is Herbert Pagel, defendant and appellant below. Respondent is the People of the State of California, plaintiff and respondent below. There are no other parties to the proceeding.

OPINION BELOW

Petitioner's appeal was heard by the Appellate Department of the Superior Court of the State of California, County of Los Angeles. In an opinion filed September 25, 1986, the Appellate Department affirmed the judgment of conviction, concluding that it was bound by the decision of the California Supreme Court in *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978). The Appellate Department's Opinion referred to this Honorable Court's opinion in *Batson*, but only in a footnote and without any reference to the equal protection rationale of that decision. (A copy of the Appellate Department's opinion is attached hereto as Appendix A. The opinion is published at 186 Cal.App.3d Supp. 1, __ Cal.Rptr. __.)

By virtue of the Appellate Department's certification that its opinion should be published, the matter was automatically presented to the Court of Appeal of the State of California, Second Appellate Distict, for a discretionary determination whether to transfer the appeal for decision to that Court. (See Rule 62, Cal. Rules of Court.) On October 30, 1986, the California Court of Appeal issued its order refusing to transfer the matter. (A copy of the October 10, 1986 Order is attached hereto as Appendix B.)

Accordingly, the appeal became final under California law on October 30, 1986.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the Appellate Department's opinion, pursuant to 28 U.S.C. sec. 1257, subd. (3), since that decision may not be reviewed by any higher court of the State of California.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED IN THIS PROCEEDING.

This proceeding involves the following Federal Constitutional provisions:

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

United States Constitution, Amendment XIV:

> "Section 1. . . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History.

Petitioner was charged with one misdemeanor count of violating California Vehicle Code section 20001, "hit and run" driving. During the course of voir dire, the court invited a prosecution motion to dismiss the jury panel and quash the remaining venire on the ground the defense was exhibiting a pattern of excusing black jurors with peremptory challenges. The next day, after argument, the court granted the motion.

The matter was then reassigned for trial before a new judge. A new jury was selected and petitioner was found guilty as charged. Petitioner was placed on summary probation for 36 months on conditions including service of 30 days in the county jail.

A timely appeal was taken by petitioner's present counsel to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. As noted above, the Appellate Department affirmed the judgment of conviction by opinion of September 25, 1986. (186 Cal.App.3d Supp. 1, __ Cal.Rptr. __. See Appendix A.) The Court of Appeal of the State of California, Second Appellate District, declined to order transfer of the cause (Appendix B) and, therefore, the appeal became final as of the date of the latter order, October 30, 1986.

B. The Jury Selection Proceedings.

The facts pertaining to the jury selection proceedings are related in the Appellate Department's Opinion (Appendix A.) For convenience, those facts may be summarized as follows:

Voir dire of the jurors commenced routinely. [12/11/84 R.T. 1-74.][1] The prosecution exercised its first peremptory on juror Virginia Brown, who was Caucasian.[2] [12/11/84 R.T. 74, 146.] The defense's first peremptory was against Darrell Street, who was black. [12/11/84 R.T. 83, 111.] The prosecution's second peremptory was against Paul Young, who was Caucasian. [12/11/84 R.T. 90, 146.] The second defense

[1]Reporter's Transcript references are indicated by the date of the transcript and the page. Line references follow the page wherever quotations are recited.

[2]Each side had a maximum of ten peremptory challenges since petitioner faced a maximum sentence of one year in jail. (Cal. Penal Code sec. 1070(a); Cal. Vehicle Code sec. 20001.)

peremptory was against Carol Pinkney, who was black. [12/11/84 R.T. 97, 146.] The prosecution's third peremptory was against C. L. Churchhill, who was Caucasian. [12/11/84 R.T. 103, 146.] The third defense peremptory was against James Mitchell, who was black. [12/11/84 R.T. 111, 146.]

Following the latter peremptory, the following dialogue occurred at bench:

> "THE COURT: Are you [prosecutor] concerned about a Wheeler[3] issue?
>
> "MS. TSO [prosecutor]: Yes, your Honor.
>
> "THE COURT: So am I."
> [12/11/84 R.T. 111:12-14.]

The court noted that all three defense peremptories had been exercised against black jurors, that the defendant is Caucasian while the alleged victim and prospective witnesses were all black. [12/11/84 R.T. 112-113.] The court then indicated it would reserve ruling on the *Wheeler* issue. [12/11/84 R.T. 114-115.] Defense counsel stated he had no plans to challenge the one remaining black juror on the panel. The prosecutor noted there was only one other black juror among the venire. [12/11/84 R.T. 115.] Voir dire continued.

The prosecution then exercised its fourth peremptory against Sherry Tatge, who was Caucasian. [12/11/84 R.T. 122, 146.] The defense exercised its fourth peremptory against Hannah Han-Rosebrock, who was Caucasian. [12/11/84 R.T. 127, 149-150.] Proceedings were continued to the next day before any further peremptories were exercised.

---

[3]Referring to *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, which established a rule in California similar to *Batson.*

The next day, the court asked defense counsel to explain the basis for his peremptories against the three black jurors. After noting the prosecutor had used all four of her peremptories against Caucasian jurors, defense counsel explained he excused juror Street because he lived close to the area where the accident occurred, because he was single, and because he had nodded off twice during the proceedings. [12/11/84 R.T. 146-147.] Counsel stated he excused juror Pinkney because she appeared scatter-brained, worked in a hospital and had observed persons with various injuries. Counsel did not want such a person deciding a hit-and-run case involving injuries to a two-year-old victim. Although juror Pinkney had had family problems with the police and had herself been arrested, counsel felt that since police involvement in the present case was minimal, that was not a factor with any relevance. [12/11/84 R.T. 148-149.] Finally, counsel excused juror Mitchell because he had once stood up in the back of the courtroom and caused a disturbance, requiring the court to ask him to take his chair, and because he was employed with the Urban League, indicating that he was active in black causes which appeared inappropriate in a case with a young black victim. [12/11/84 R.T. 149.] Finally, counsel noted that he had used one of his peremptories against a Caucasian juror and that he had no intention to use a peremptory against the one black juror who was still on the panel. [12/11/84 R.T. 149-150.]

The court found "the defense has not been sustained as to all of the questioned challenges, particularly as applied to one of the jurors, Mr. Street." [12/11/84 R.T. 153:16-18.] The court then dismissed the panel which had thus far been selected and quashed the remaining venire. [12/11/84 R.T. 153-154.]

Subsequently, another jury was selected with defense counsel subject to the *Wheeler* restrictions. That jury found petitioner guilty as charged.

LEGAL DISCUSSION OF REASONS FOR CERTIORARI

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ISSUE SPECIFICALLY RESERVED BY THIS HONORABLE COURT IN *BATSON V. KENTUCKY*, I.E., WHETHER THE CONSTITUTIONAL LIMITATIONS ON A PROSECUTOR'S USE OF PEREMPTORY CHALLENGES SHOULD ALSO BE IMPOSED UPON DEFENSE COUNSEL.

A. The Issue Is Important and Suitable For Review By Writ of Certiorari.

Without question, the issue presented by this petition is an important one and suitable for review by this Honorable Court on a writ of certiorari. In *Batson*, this Court specifically noted the issue and stated:

> "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (476 U.S. at ___, 106 S.Ct. at 1718, fn. 12.)

This Honorable Court has also indicated the importance of the *Batson* rule, by granting certiorari on the issue whether the rule should be applied retroactively. (See Docket Nos. 85-5221 and 85-5731.)

Surely, the issue whether the *Batson* rule should be applied to defense counsel is at least as important as the retroactivity of that rule and, indeed, is arguably as important as the underlying rule itself since it goes to the heart of a defendant's right to a jury trial.

The significance of the issue and of the need for this Honorable Court to decide it is also underlined by the significance of the considerations, both pro and con,

which have been suggested for determination of the question itself. As discussed in more detail below, those considerations include the desire of the State to assure equal access to participation on juries to all members of society, as well as numerous considerations bearing on a criminal defendant's individual rights to equal protection of the laws and to a jury trial.

B. The *Batson* Rule Should Not Apply To Defense Counsel.

The primary reason why the *Batson* rule should not be applied to defense counsel is that the rule is meant to protect an *individual defendant's* rights under the Equal Protection Clause of the Fourteenth Amendment. This is apparent from *Batson*'s frequent references to the Equal Protection Clause and/or to the necessity of protecting an individual defendant from discrimination by the State. The following are some examples from the opinion:

> 1. "This case requires us to re-examine . . . the evidentiary burden placed on a criminal defendant who claims that he has been denied *equal protection* through the State's use of peremptory challenges. . . ." (106 S.Ct. at 1714; emphasis added.)
>
> 2. ". . . a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " (106 S.Ct. at 1716, citing *Swain v. Alabama*, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827 (1965).)
>
> 3. "*The Equal Protection Clause guarantees* the defendant that *the State will not* exclude

members of his race from the jury venire on account of race. . . ." (106 S.Ct. at 1717; emphasis added.)

4. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection. . . ." (106 S.Ct. at 1717.)

5. "Those on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment. . . ." (106 S.Ct. at 1771; footnote omitted.)

6. ". . . a defendant's right to be tried by a jury of his peers is designed 'to prevent oppression by the Government.' " (106 S.Ct. at 1717, citing *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1451, fn. 8 (1968).)

7. ". . . the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice. . . ." (106 S.Ct. at 1718.)

8. "Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.'" (106 S.Ct. at 1718.) (This quotation is immediately followed in the opinion by footnote 12 in which this Honorable Court states, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.")

9 ". . . our decision enforces the mandate of equal protection and furthers the ends of justice." (106 S.Ct. at 1724.)

Concededly, there are references in *Batson* to grounds that could be considered as supporting a rule that defense counsel are also limited in the exercise of their peremptory challenges. Most notably, these references include:

> 1. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (106 S.Ct. at 1718.)
>
> 2. "In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." (106 S.Ct. at 1724.)

Nevertheless, petitioner submits that in balancing the considerations noted in *Batson*, a determination upholding a defendant's right to unfettered use of peremptory challenges is the wiser choice because that result will ensure the sanctity of the defendant's centuries old right to jury trial, while having very little effect on the right of all citizens to participate in the jury system or on the level of respect in which our criminal justice system is held.

A further and significant reason for limiting the *Batson* rule to prosecutors follows from the distinct difference between the ethical duties of prosecutors and defense attorneys. A prosecutor has a dual role "as the defendant's adversary and as a guardian of the defendant's constitutional rights." (*People v. Trevino*, 39 Cal.3d 667, 681, 217 Cal.Rptr. 652, 704 P.2d 719 (1985). See also *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 [The interest of the prosecution "is not that it shall win a case, but that justice shall be done."]) On the other hand, defense counsel is ethically obligated

to devote his energies solely to the proper defense of his client.

Accordingly, it was quite proper for this Honorable Court to hold in *Batson* that the prosecutor's role "as a guardian of the defendant's constitutional rights" requires restrictions on the prosecutor's use of peremptory challenges when those challenges impinge on the defendant's right to equal protection. Conversely, however, defense counsel's role in a criminal prosecution is more limited — he or she is ethically obligated to focus his or her efforts solely on behalf of the defendant. Defense counsel should therefore not be answerable to the court or to the State for tactical decisions that are and always have been within the purview of a defense counsel's duties.

Nor should the result be swayed by the generalized consideration that application of the *Batson* rule to defense counsel would be "desirable." There are many "desirable" restrictions that could be, but are not, placed upon defense counsel because of more significant countervailing reasons designed to protect a criminal defendant's rights. These include the obligation of defense counsel to maintain in confidence statements made to him or her by a defendant, even where those statements show the defendant's guilt and would allow a conviction to be obtained where otherwise one would not.

Furthermore, a criminal defendant has a unique personal interest in a case and, to avoid juror bias in favor of the prosecution, it is fair "to grant a defendant an opportunity to exclude a limited number of jurors [which he or] she intuitively dislikes or distrusts, regardless of the basis for the antagonism. . . ." (Note, The Defendant's Right To Object To Prosecutorial Use

Of The Peremptory Challenge (1979) 92 Harv.L.Rev. 1770, 1787.) After all, the defendant is the only person involved in a criminal trial who faces the possibility of imprisonment. Thus, the defendant's ancient right to exclude particular jurors for reasons which cannot readily be articulated and which may even be irrational is both necessary and desirable so that, if convicted, the defendant may not harbor any resentment or hostility over the process which led to the conviction.

The above law review commentary is also pertinent for the following aspects of its analysis:

> ". . . . Unlike the prosecutor, the defendant is not a state actor, so [his or] her use of group stereotypes as the sole criterion for peremptory challenges in no way reflects state support for such conduct. Since the defendant does not represent the state, there is reason to permit the defendant to use the peremptory challenge for any reason, even on the sole basis of group affiliation." (92 Harv.L.Rev. at 1786; footnotes omitted.)

The same commentary provides a factual as well as legal basis for its conclusion:

> ". . . . The defendant's use of the challenge should not be so limited for two reasons. First, the availability of the peremptory challenge may be more important to the defendant than to the government; one study showed that 25% to 30% of the members of the federal and state jury pools believe a defendant is probably guilty once indicted, while another showed that only 5% of the jury pool had animosity toward the government. But more important, it may be

> only fair to grant a defendant an opportunity to exclude a limited number of jurors [he or] she intuitively dislikes or distrusts, regardless of the basis for the antagonism, since the defendant's involvement in [the] trial is so personal and immediate. The prosecutor, on the other hand, has no such personal stake in the use of the peremptory challenge." (92 Harv.L.Rev. at 1787; footnotes omitted.)

The above note refers to this Court's approving reference to Blackstone's Commentaries:

> "The right of challenge . . . has always been held essential to the fairness of trial by jury. As was said by Blackstone and repeated by Mr. Justice Story: 'In criminal cases . . . there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a "peremptory challenge;". . . . As everyone must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.' " (*Lewis v. United States,* 146 U.S. 370, 376, 13 S.Ct. 136, 138 (1892), quoting 4 Blackstone's Comm. 353, and *U.S. v. Marchant*, 4 Mason 160, 162, 12 Wheat 480, 482.)

And as reiterated by this Court in *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414 (1894):

> "The [peremptory challenge] is one of the most important of the rights secured to the accused. . . . Any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned."

In summary, although reasons of substance may be given for application of the *Batson* rule to defense counsel, on balance the reasons for limiting the rule to prosecutors should prevail. The defendant's time-honored right to unfettered peremptory challenges and his individual rights against the power of the State, guaranteed by the Sixth and Fourteenth Amendments, must outweigh the very limited benefit to general societal goals such as equal access to participation in the jury system.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Honorable Court grant this Petition For Writ of Certiorari to review the issue reserved in *Batson*, i.e., whether the rule established in that decision should be applied to defense counsel.

Respectfully submitted,

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HERBERT PAGEL

APPENDIX

FILED
SEP 25 1986
FRANK A. ZOLIN, County Clerk
Alan Hardey
BY ALAN HARDEY, DEPUTY

CERTIFIED FOR PUBLICATION

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HERBERT PAGEL, Defendant and Appellant.	Superior Ct. No. CR A23539 Municipal Court of the Los Angeles Judicial Dist. No. V 182550 OPINION AND JUDGMENT

Appeal by defendant from Judgment of the Municipal Court,

Larry Paul Fidler, Judge.

JUDGMENT AFFIRMED.

For Appellant - Edward J. Horowitz

For Respondent - James K. Hahn, City Attorney
Greg Wolff, Deputy City Attorney
By Arthur B. Walsh, Deputy City Attorney

APPENDIX A

-o0o-

Defendant Herbert Pagel appeals from a judgment of conviction following a jury trial at which time he was found guilty as charged in a misdemeanor complaint of violating Vehicle Code section 20001 (hit-and-run resulting in injury).

His sole assignment of error concerns the trial court's granting of the People's motion to dismiss the selected jurors and to quash the remaining first panel of prospective jurors on the ground that defendant had exercised his peremptory challenges systematically to exclude blacks from the jury.

We find no error.

I. PROCEDURAL AND FACTUAL BACKGROUND:

The record, in relevant part, reflects the following transpired during the initial jury selection process on December 11, and 12, 1984.

During voir dire defendant, through his attorney, exercised his first three peremptory challenges against prospective jurors Darrell S. Street, Carol Pinkney, and James T. Mitchell, each of whom is black.

Street stated that he lived in Los Angeles in the general vicinity of Washington and Crenshaw Boulevards. He was single and worked as a billing supervisor in the home delivery department of the Los Angeles Times. He had no prior jury experience. Street disclosed that his brother was a retired deputy sheriff, that several of his neighbors were attorneys, and that a Court of Appeal Justice lived nearby.

Pinkney stated that she lived in Inglewood and that she was separated from her husband. She also disclaimed any prior jury experience. Out of the presence of the

other jurors, Pinkney disclosed that her estranged husband had been shot by the police when he was arrested for being under the influence of PCP, that her brother had been arrested for carrying a loaded weapon in his vehicle, and that she herself had been recently stopped at gun point by police officers who believed that the vehicle she was driving, which was her own, had been stolen. Pinkney further disclosed that she had been in four automobile accidents. She also stated that during the course of her employment as a ward clerk in a hospital she occasionally saw victims of automobile accidents.

Mitchell stated that he lived in the central part of Los Angeles and that he was single. He was employed as a recruiter for the Urban League. Mitchell expressed several complaints against law enforcement officers and the court system. In particular he was concerned about the treatment his brother had received many years earlier after his brother was found to be insane when he killed Mitchell's father.

Following defendant's third peremptory challenge, the prosecutor approached the bench and expressed her concern about defendant's apparent attempts to excuse all prospective black jurors. The trial court agreed that her concern was warranted under *Wheeler*. (*People v. Wheeler* (1978) 22 Cal.3d 258.) The court then pointed out that defendant is white while both the victim and the People's witnesses are all black.

Defense counsel responded by positing various reasons for excusal of the three black prospective jurors. He asserted that Mitchell was excused because he perceived Mitchell as a person who had "a chip on his shoulder with the entire court system" and who could not render a fair and impartial decision. Defense counsel also

claimed that Mitchell's negative attitude towards law enforcement would be unimportant to his defense strategy since law enforcement played a minimal role in this case.

The court expressly disagreed with this latter claim, pointing out that the testimony of the black investigating officer would bring in certain statements made by defendant.

As for Pinkney, defense counsel explained that he believed that she also had so many problems with the court system that she could not be fair and impartial.

Finally, defense counsel stated that he "really [did not] have an answer regarding Mr. Street as I do with the other two." He added, however, that regardless of race, he would have excused Pinkney and Mitchell.

When defense counsel announced that he had no plans to challenge the remaining black on the panel, the prosecutor pointed out that there were no black males remaining and that the one remaining black was Mrs. Harris, a female.

The court deferred ruling on the *Wheeler* motion, and voir dire continued. Defendant later exercised a fourth peremptory challenge to excuse a white juror, Hannah Han-Rosebrock.

Prior to jury selection the next morning, the People presented additional argument in support of their motion. The court then found that the People had made a prima facie showing that defendant had utilized peremptory challenges systematically on the basis of group bias. It next invited further explanations from defense counsel.

In response, defense counsel asked the court to consider his statements made on the previous day and

added the following explanations: He had excused Street "solely on the basis that I thought he lived too close to the area where the accident occurred. He was single. I also noted, judge, that he was nodding off two times way before I dismissed him." He excused Pinkney, because she was "scatterbrained", worked in a hospital, and had seen gunshot wounds and stabbings. She was therefore not someone defendant wanted to be deciding his fate. As for Mitchell, he reiterated his concern with Mitchell's law enforcement problems, expressed his concern that Mitchell had caused an earlier disturbance in the court, and stated his belief that "a person working on the Urban League" should not be deciding what happens to defendant.

Defense counsel reminded the court that he had previously indicated that he would not challenge Mrs. Harris, who was in fact selected as a juror. He argued that "we are making too much out of the black race here" and accused the People of attempting to exclude whites systematically by dismissing four white jurors.

The prosecutor took exception to defense counsel's stated reasons, essentially arguing that defense counsel was trying to cover his tracks with respect to the three black prospective jurors who had been peremptorily excused. She pointed out that Mrs. Harris, who is black and was not peremptorily challenged, had a 1-1/2 year old child. The black victim was only 2 years old at the time of the incident. She also pointed out that defense counsel only challenged the white prospective juror *after* the *Wheeler* motion was made and that this particular person was in fact on the panel prior to Pinkney and Mitchell, who had been called to fill in slots left vacant by excused prospective jurors. The prosecutor also disclaimed any personal knowledge of Street nodding in court.

The trial court rejected the explanations proffered by defense counsel. The court announced that it was not satisfied that the peremptory challenges had been exercised for specific bias and found that the stated grounds were not reasonably relevant to the particular case on trial. The court noted that defense counsel had conducted only minimal voir dire questioning of the three excused prospective black jurors, who were "two males and a female with different and varied life experiences and backgrounds." The court then dismissed the jury members selected thus far and quashed the remaining venire.

On December 13, 1984, a new jury venire was empaneled. On December 17, 1984, a jury was selected without further objections by the prosecution or any objections by the defense as to the jury selection process.

II. DISCUSSION

A peremptory challenge is "an objection to a juror for which no reason need by given, but upon which the court must exclude him." (Pen. Code, § 1069.)

In *People v. Wheeler, supra,* our Supreme Court held that "the use of peremptory challenges to remove prospective jurors on the ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution."[1] (*Wheeler, supra,*

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[1]The right to a trial "by impartial and unprejudiced jurors" is implicit in the right to a jury trial guaranteed by article I, section 16, of the California Constitution. (*Wheeler, supra,* at p. 265.) It is now settled, however, that the Sixth Amendment's express guarantee of an impartial jury is applicable to the states through the Fourteenth Amendment to the federal Constitution. (*Duncan v. Louisana* (1968) 391 U.S. 145, 149.)

Recently, the United States Supreme Court in *Batson v. Kentucky* (1986) 476 U.S. ___, 90 L.Ed.2d 69, 106 S. Ct. 1712 held that

22 Cal.3d 258, 276-277.) The *Wheeler* court explained that "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." (*Id.*, at p. 280.)

Initially, defendant argues that the *Wheeler* peremptory challenge restriction applies only to peremptory challenges exercised by the prosecution. He concludes that the court therefore erred in finding that the *Wheeler* principle applied to defendant's use of peremptory challenges against the three black prospective jurors.

We disagree.

"It has always been understood that public support for a system of justice depends not only on the capacity of that system to render justice in fact, but also on its ability to project to the parties and public an unimpeachable image of fairness. The peremptory challenge has long acted as a fixative for preserving that

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"the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. . . . [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Id.*, at pp. 82-83; fn. omit.) The Supreme Court, however, stated: "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (*Id.*, at fn. 12.) Nonetheless, the court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' " (*Id.*, at pp. 81-82.)

image. Its purpose has always been to insure that criminal trials are conducted before jurors who not only proclaim their impartiality, but whose ability to be evenhanded is not seriously questioned by the parties. (*People v. Williams* (1981) 29 Cal.3d 392, 404; fn. omit.) "It is not 'a function of the examination of prospective jurors . . . to prejudice the jury for or against a particular party. . . .' " (*Id.*, at p. 408.)

In *Wheeler* the court expressly announced that "the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold the contrary would frustrate other essential functions served by the requirement of cross-sectionalism [such as legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups]. . . . For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone." (*Wheeler, supra,* at fns. 6, 29; see also, *People v. Trevino* (1985) 39 Cal.3d 667, 679.)

Defendant's attempt to derogate the significance of such language as dicta is of no avail. It was in the context of expressly finding that the People have "the right to object to the same misuse of peremptory challenges on the part of defense counsel" "under the constitutional theory we adopt herein . . ." that the *Wheeler* court made the observations quoted in the preceding paragraph. Accordingly, such language does not constitute merely an "aside" or a "throw-away point". Instead, it reflects

the mandate of the California Supreme Court, which is a matter that this court cannot disregard.[2]

Defendant's remaining contention concerns the trial court's finding that defendant failed to sustain his burden to justify his use of the peremptory challenges in question.[3] Essentially, he asserts that the court was bound to accept his explanations.

We again disagree.

"If the court finds that a prima facie case has been made, [which defendant here concedes,] the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses --- i.e., for reasons of specific bias. . . . He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that

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[2]In *People v. Trevino* (1985) 39 Cal.3d 667 our Supreme Court stated: "In *Wheeler* we suggested that the People also have the right under the representative cross-section requirement to challenge the defendant's use of peremptory challenges. That issue is not now before this court." (*Id.*, at fn. 10.) We note that the word "suggested" detracts somewhat from the force of what we perceive the *Wheeler* mandate to be. Nonetheless, the *Trevino* court did not in fact disapprove or overrule the language in *Wheeler* giving rise to such right. We therefore conclude that the mandate remains intact and must be implemented on the facts presented in the present case.

[3]Defendant's justification below that the People systematically excluded white potential jurors must be rejected summarily. Defendant cannot sustain his burden "by attempting to cast a different burden on his opponent." (*Wheeler, supra*, at fn. 30.)

in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler, supra*, at pp. 281-282.)

In the present case the trial court expressly stated that it was not satisfied with the explanations put forward by defendant, especially as to prospective juror Street. We uphold the court's rejection of defendant's explanations as unsatisfactory.

"[I]t is imperative, if the constitution guarantee is to have real meaning, that once a prima facie case of group bias appears the allegedly offending party [is] required to come forward with the explanation to the court that demonstrates other bases for the challenges *and* that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the . . . explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the [offending party] has examined members of the venire and has exercised challenges for cause or peremptorily. . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

From the foregoing recital of law it is clear that the trial court's determination of specific bias or group bias revolves around the issue of credibility.[4] "Questions as

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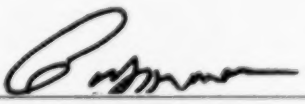
[4]In *Wheeler* the court deemed "it unnecessary to remind counsel, whether prosecutor or defender, of their legal and ethical responsibilities to seek justice and to offer only truthful reasons for the exercise of peremptory challenges." (*Wheeler, supra*, at fn. 11.)

to the credibility of witnesses and the weight to be given their testimony are for the trier of facts, and, . . . it is the trier of facts who must determine to what extent testimony is to believed or disbelieved." (*Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 518.) Similarly, it is the function of the trial court to evaluate and determine the genuineness of the explanations offered by the offending party to rebut the inference of impermissible group bias. (*Hall, supra*, at pp. 167-168.) As an appellate court, we cannot retry credibility. (*People v. French* (1978) 77 Cal.App.3d 511, 523.) Instead, we must defer to the trial court's assessment of the proffered explanations. (See, e.g., *People v. Clay* (1984) 153 Cal.App.3d 433, 453; cf. *Clay, supra*, at pp. 455-456; *People v. Randle* (1982) 130 Cal.App.3d 286, 295; see also, *People v. Johnson* (1978) 22 Cal.3d 296, 299-300 [where proffered reason was insufficient as a matter of law].)

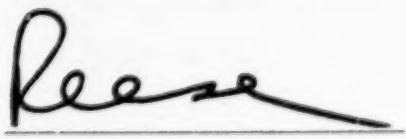
The judgment is affirmed.



Presiding Judge

We concur.

Judge



Judge

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HERBERT PAGEL, Defendant and Appellant.	B023570 (Super.Ct.No. CR A23539) (Mun.Ct. of the Los Angeles Jud.Dist.No. V 182550) MEMORANDUM

COURT OF APPEAL - SECOND DIST.
FILED
OCT 30 1986
CLAY ROBBINS, JR. Clerk
Deputy Clerk

THE COURT:

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles having been filed on September 25, 1986, that court having made its order for publication of the opinion in the Advance Appellate Reports, and that opinion having been examined by the Court within thirty (30) days after the decision of the Appellate Department became final, this court has determined that transfer under California Rules of Court, rule 62, subdivision (a) is unnecessary.

APPENDIX B

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 29, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk, Appellate Department
of the Superior Court
Department 70
111 North Hill Street
Los Angeles, California 90012

Clerk, California Court of
Appeal
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

Office of the City Attorney
200 North Main Street
Room 1700
Los Angeles, California 90012

Honorable Larry Fidler
Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 29, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)